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IN THE

Supreme Court of the United States

OCTOBER TERM 1972

72-1257

UNITED NEW YORK SANDY HOOK PILOTS ASSOCIATION and UNITED NEW JERSEY SANDY HOOK PILOTS ASSOCIATION,

Petitioners,

against

MAURICE H. STANS, Secretary of Commerce, JOHN B. CONNOLLY, Secretary of the Treasury, ANDREW GIBSON, as Assistant Secretary of Commerce and as Maritime Administrator, Maritime Administration, Department of Commerce, M. E. PARR, Chief, Office of Subsidy Administration, Maritime Administration, Department of Commerce,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, United New York Sandy Hook Pilots Association and United New Jersey Sandy Hook Pilots Association, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this cause December 19, 1972.

The Judgment Sought to be Reviewed

The judgment unanimously affirmed a summary judgment of the United States District Court for the Eastern District of New York (George Rosling, Judge) which dis-

missed plaintiff's complaint (3a-11a*) for a declaration that the Maritime Administration of the Department of Commerce erred in holding that Section 607(a) and (k) of the Merchant Marine Act of 1970 (46 U.S.C. 1177(a) and (k)) does not apply to plaintiffs' pilot vessels and on that ground rejecting petitioners' application for the establishment of a fund for the construction of a replacement pilot station vessel.

Opinions

Annexed hereto (at pp. 1a-5a, *infra*), is a copy of Judge Rosling's Memorandum Opinion. It appears not to have been reported.

Also annexed (at pp. 6a-7a, *infra*) is the judgment entered in the District Court.

Also annexed is a copy of the Per Curiam opinion and judgment of the Court of Appeals (at 8a-10a, *infra*). It is reported in 474 F 2d 1176.

Jurisdiction

This petition is filed pursuant to 28 U.S.C. 1254(1), within 90 days after the entry of judgment in the Court of Appeals (28 U.S.C. 2101(c)).

Petitioners brought their action in the District Court under 28 U.S.C. 1337 ("civil action or proceeding arising out of any Act of Congress regulating commerce"); also 28 U.S.C. 1361 ("action in the nature of mandamus to compel an officer or an employee of the United States or any agency thereof, to perform a duty owed to the plaintiff"); also 28 U.S.C. 2201-2 ("actions for declaratory judgments"; *Safir* v. *Gibson*, 417 F 2d 972, 2d Circ. 1969).

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* Numerals followed by the letter "a", except when otherwise indicated, refer to the appendix filed in the Court of Appeals. Those references are made solely by way of corroboration; for that purpose a single copy of that appendix is submitted herewith.

The Question Presented for Review

The sole question in this case is one of statutory construction.

As will appear *infra*, one of the major aims of the Merchant Marine Act of 1970 was to stimulate and increase ship-building in the United States. The Act devised such a stimulus: a provision for deferring taxation of income set aside by shipowners for domestic construction of new ships to "be operated in the foreign trade of the United States" under the United States flag.

The question presented below and here is:

> Do the statutory words "any vessel . . . operated in the foreign trade of the United States" mean *any* such vessel or does it mean *only line haul vessels* operated in the foreign trade of the United States?

Petitioners' pilot vessels are used exclusively in the process of conveying to and from line-haul vessels operated in the foreign trade, pilots without whom such carrying vessels can not enter or leave the New York-New Jersey harbor and its connecting waters.

The vessel for which petitioners sought to contract with the Secretary of Commerce under Section 607(a) and (k) was to *be operated exclusively in that indispensable component of the international shipping trade.*

The District Court held that although "a pilot boat provides service to boats that do operate in foreign trade" it was not "shown . . . that the pilot vessel itself is engaged in foreign trade in the sense in which the Act was enacted. Plaintiffs would have us construe 'vessels operated in the foreign trade' as though that read 'auxiliary vessels which assist vessels operating in the foreign trade' " (41a).

The Court of Appeals held: "A pilot station vessel neither operates in the United States foreign trade nor adds to the 'sealift capacity' of our Merchant Marine" (pp. 9a-10a, *infra*).

Neither court gave any reason why "operated" in this statute should be more narrowly construed than the word "engaged" in the Employers Liability Act, The Fair Labor Standards Act and other statutes under the commerce clause (see pp. 11-15, *infra*).

The Statute

The pertinent portions of the statute—the Merchant Marine Act of 1936, section 607, as amended by Merchant Marine Act of 1970 (Public Law 91-469, approved October 21, 1970) which is also 46 U.S.C. 1177—are as follows (with the critical portions reproduced in italics):

"§ 607. Capital construction fund . . .

(a) *Any citizen* of the United States owning or leasing one or more *eligible vessels* (as defined in subsection (k) (1) of this section) may enter into an agreement with the Secretary of Commerce under, and as provided in, this section to establish a capital construction fund (hereinafter in this section referred to as the 'fund') with respect to any or all of such vessels. Any agreement entered into under this section shall be for the purpose of providing replacement vessels, additional vessels, or reconstructed vessels, *built in the United States and documented under the laws of the United States for operation in the United States foreign,* Great Lakes or noncontiguous domestic *trade* or in the fisheries of the United States and shall provide for the deposit in the fund of the amounts agreed upon as necessary or appropriate to provide for qualified withdrawals under subsection (f) of this section. The deposits in the fund, and all withdrawals from the fund,

whether qualified or nonqualified, shall be subject to such conditions and requirements as the Secretary of Commerce may by regulations prescribe or are set forth in such agreement; except that the Secretary of Commerce may not require any person to deposit in the fund for any taxable year more than 50 percent of that portion of such person's taxable income for such year (computed in the manner provided in subsection (b)(1)(A) of this section) which is attributable to the operation of the agreement vessels.

• • •

(f) Purposes of Qualified Withdrawals.

(1) A qualified withdrawal from the fund is one made in accordance with the terms of the agreement but only if it is for:

(A) the acquisition, construction, or reconstruction of a qualified vessel,

(B) the acquisition, construction, or reconstruction of barges and containers which are part of the complement of a qualified vessel, or

(C) the payment of the principal on indebtedness incurred in connection with the acquisition, construction or reconstruction of a qualified vessel or a barge or container which is part of the complement of a qualified vessel.

Except to the extent provided in regulations prescribed by the Secretary of Commerce, subparagraph (B), and so much of subparagraph (C) as relates only to barges and containers, shall apply only with respect to barges and containers constructed in the United States.

• • •

DEFINITIONS

(k) For purposes of this section—

(1) The term '*eligible vessel*' means *any* vessel—

(A) constructed in the United States and, if reconstructed, reconstructed in the United States,

(B) documented under the laws of the United States, and

(C) operated in the foreign or domestic commerce of the United States or in the fisheries of the United States.

• • •

(2) The term '*qualified vessel*' means *any* vessel—

(A) constructed in the United States and, if reconstructed, reconstructed in the United States,

(B) documented under the laws of the United States, and

(C) which the person maintaining the fund agrees with the Secretary of Commerce *will be operated in the United States foreign* Great Lakes, or noncontiguous domestic *trade* or in the fisheries of the United States.

• • •

(3) The term 'agreement vessel' means any eligible vessel or qualified vessel which is subject to an agreement entered into under this section.

• • •

(5) The term 'United States foreign trade' includes (but is not limited to) those areas in domestic trade in which a vessel built with construction-differential subsidy is permitted to operate under the first sentence of section 1156 of this title.

• • •

(7) The term 'vessel' includes cargo handling equipment which the Secretary of Commerce determines is intended for use primarily on the vessel. The term

'vessel' also includes an ocean-going towing vessel or an ocean-going barge or comparable towing vessel or barge operated on the Great Lakes."

Statement of the Case

(1) The power of Congress over interstate and foreign commerce embraces "pilotage, as applied to vessels engaged in foreign or interstate commerce" (*Huus* v. *New York and Puerto Rico Steamship Company,* 182 U.S. 392; 1900). Congress, since the early days of the Republic, has chosen to integrate the State pilotage laws into the national law governing navigation (*Cooley* v. *Board of Wardens of the Port of Philadelphia,* 12 How. (53 U.S.) 299, 314-20; 1851). "Pilots are . . . indispensable cogs in the transportation system of every maritime economy" (*Kotch* v. *Board of River Port Pilot Commissioners for the Port of New Orleans,* 330 U.S. 552, 558; 1947). ". . . a pilot . . . is the temporary master charged with the safety of the vessel and cargo, and of the life of those on board, and entrusted with the command of the crew" (*Cooley* v. *Board of Wardens, supra,* at p. 315). Although "on board during only part of the voyage" (Id. at p. 316), that part is an integral of the whole (Id.).

(2) The two plaintiffs are respectively New York and New Jersey corporations whose respective capital stock is held by trustees for unincorporated associations of "Sandy Hook" pilots licensed under the laws of those respective states (3a-4a, 21a-22a).*

To fulfill their statutory duty of piloting vessels through the New York-New Jersey harbor and connecting waters, on their arrival and departure, the Sandy Hook pilots

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*New York State Navigation Law, 36 McKinney's Consolidated Laws of New York Annotated, sec. 87-92; Compiled Statutes of New Jersey 1709-1910.

maintain a fleet of vessels on which there always are a sufficient number of licensed pilots to respond to every call for a pilot any minute of any day throughout the year (4a, 22a).

To that end, the pilots, since 1930, to handle approximately 1,600 ships a month, have maintained in the vicinity of Sandy Hook three specially constructed vessels, denominated pilot station vessels, and approximately five smaller pilot vessels, denominated pilot vessels (22a). All of them are in continuous service, 24 hours each day throughout the year (id.).

Each of the pilot station vessels is a fully equipped seaworthy vessel, with sleeping quarters for members of the crew and for pilots, heads, galleys and messhalls; each is manned by continuous crews, comprised of a captain, a mate, engineers, sailors, cooks and messboys (22a-23a).

Each of those station vessels is unanchored and constantly in motion, usually cruising within the area shown on the chart which appears at 9a, in the vicinity of Ambrose Light, 22 miles and more from the southern tip of Manhattan and eight miles and more from the nearest shore. Each of the vessels is ever ready, whenever it becomes necessary, to go out into international waters, and does so when required by weather conditions or to render emergency service or when called by an incoming ship (23a).

There are always pilots on these station vessels in readiness to respond to a call for a pilot. They are dispatched from one of the station vessels as needed, and they return to the station vessel upon completion of their piloting assignments (23a). Each station vessel is equipped with telephones and radios and maintains communication with the mainland and with approaching and departing vessels (id.).

Pilots are dispatched from them in launches (of which

one or more always are alongside of the station vessel) which take them to and from incoming and outgoing ships (23a).

(3) The plaintiffs have been directed by the New York Board of Pilot Commissioners to construct a new pilot station vessel in substitution for one which, in the opinion of the Commissioners, should be retired from service (25a). Accordingly, the plaintiffs, on or about December 1, 1970, filed the application which is the subject of this action (5a-6a) and contracted for the construction of a twin-screw diesel, 1700 horsepower vessel, 182½ feet long, with a 34 foot beam, and a speed of 14½ to 15 knots, equipped with two 24 foot launches for quick and easy dispatch and with four life rafts. A 48 foot motor launch, when not transporting pilots to and from the incoming and outgoing ships, will be alongside the station vessel except in bad weather, when it will maneuver by itself in the vicinity of the station vessel (25a). The motor launch, together with the two smaller launches, will always be in service for ferrying pilots (25a-26a).

The new station vessel—containing 16 staterooms as living quarters for the pilots, besides living quarters also for the crew—is operated by a captain with a mate, four sailors, three engine room men, two cooks, two messboys, and two men to man the motor launches (26a).

Reasons for Allowance of the Applied for Writ

1. The thrust of the opinions of the District Court and of the Court of Appeals is that notwithstanding the sweep of the statutory language, the benefits of Section 607(a) are available only for vessels which ply between a United States port and a foreign port. That excludes not only the pilot vessels in every harbor in our country—along the St. Lawrence River and our Atlantic, Gulf and Pacific shores; it excludes also many vessels of various types

which are necessary to, and are operated in, the United States foreign trade, such as lighters, derrick lighters, docking tugs, derrick tugs and vessels which carry goods between inland ports and transocean carriers—indeed all vessels other than those which carry passengers or cargo between United States ports and foreign ports. If that were Congress's intention, would Congress not have said so quite plainly? (See *infra*, pp. 11-19).

2. Manifestly, that exclusionary decision *adversely* affects: all owners of vessels in the excluded categories; also the domestic ship builders who would have gotten and would be getting orders for the construction of such vessels; also the extent to which the objectives of the 1970 Act are attained. It follows that for many in the shipping and shipbuilding industries, this is a *test case* of substantial importance.

3. The restrictive construction by the courts below of the unrestricted language of Section 607(a) and (k) is contrary to the comprehensive and out-reaching application which has been given to parallel language in the Acts of Congress under the commerce clause of the Constitution. Thus it seems that the decision herein is in conflict with many truly applicable decisions of this Court. (See pp. 11-15, *infra*).

4. Moreover, if not reversed by this Court, the decision here may start a regressive tendency, if not trend, in the construction of other Acts, present and future, under the commerce clause.

5. Petitioners have invested several million dollars in building the vessel which was the subject of the application to the Secretary of Commerce. The outcome of this litigation, therefore, is of substantial monetary consequence to the petitioners.

ARGUMENTS IN SUPPORT OF THE ALLOWANCE OF THE WRIT

I

No justification is apparent for digressing from the well settled principle that, in the absence of exceptions or qualifications therein, a statute in respect to commerce (whether foreign or interstate) is deemed to embrace every segment thereof.

In *Puget Sound Stevedoring Co.* v. *State Tax Commission*, 302 U.S. 90 (1937), this Court held that a local stevedoring corporation, as an independent contractor, unloading, through local employees, cargoes of vessels engaged in interstate or foreign commerce, was so identified with those vessels, as to be immune from State taxation in respect to that business.

"An independent contractor", the Court (by Justice Cardozo) reasoned, "undertaking to navigate a vessel, would have the same protection as a pilot agreeing to navigate it himself" (at p. 94). Applying that analogy, the Court reasoned further (at pages 92-3):

> "Transportation of a cargo by water is impossible or futile unless the thing to be transported is put aboard the ship and taken off at destination. A stevedore who in person or by servants does work so indispensable is as much an agency of commerce as shipowner or master . . . No one would deny that the crew would be engaged in interstate or foreign commerce if busied in loading or unloading an interstate or foreign vessel. Cf. *Baltimore & O.S.W.R. Co.* v. *Burtch*, 263 U.S. 540. The longshoreman busied in the same task bears the same relation as the crew to the commerce that he serves. Indeed, for the purposes of the Merchant Marine Act (41 Stat. 988, 1007), a stevedore is a 'seaman'. *International Stevedoring Co.* v. *Haverty*, 272 U.S. 50 . . .

> . . . True, the service did not begin or end at the ship's side, where the cargo is placed upon a sling attached to the ship's tackle. *It took in the work of carriage to and from the 'first place of rest'* [emphasis added], which means that it covered the space between the hold of the vessel and a convenient point of discharge upon the dock. * * * The fact is stipulated, however, that no matter by whom the work is done or paid for, 'stevedoring services are essential to waterborne commerce and always commence in the hold of the vessel and end at the "first place of rest", and vice versa.' In such circumstances services beginning or ending in the hold or on the dock stand on the same plane for the purposes of this case as those at the ship's sling * * *."

In *Pedersen* v. *Delaware L.&W.R. Co.*, 229 U.S. 146 (1913), it was held that because railroad

> "tracks and bridges were indispensable to interstate commerce . . . the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it."

The same reasoning, in *Overstreet* v. *North Shore Corp.*, 318 U.S. 125 (1942), was held to apply to the maintenance and operation of a privately owned toll road and a drawbridge which together constituted a medium for the interstate movement of goods and persons. In that case, this Court said (at pp. 129-132):

> ". . . Vehicular roads and bridges are as indispensable to the interstate movement of persons and goods as railroad tracks and bridges are to interstate transportation by rail. Those persons who are engaged in maintaining and repairing such facilities should be considered as 'engaged in commerce' even as was the bolt-carrying employee in the *Pedersen* case, *supra*, . . ." (At pp. 129-130).

The Court continued:

> "... The work of each petitioner in providing a means of interstate transportation and communication is so intimately related to interstate commerce 'as to be in practice and in legal contemplation a part of it' (Pedersen's case, *supra*) ... [at p. 130] ... [and] must be regarded, ... as 'engaged in commerce' within the meaning of §§ 6 and 7 of the Act...." (at p. 132)

It is easy to multiply illustrations and citations to the same effect (e.g. *Philadelphia-Baltimore and Washington Railroad* v. *Smith,* 250 U.S. 101 (1919); *New York Central R.R. Co.* v. *Marcone,* 281 U.S. 345 (1930); *Overnight Motor Co.* v. *Missel,* 316 U.S. 572 (1942).

In *McLeod* v. *Threlkeld,* 319 U.S. 491 (1942), this Court said, at page 495:

> ". . . instrumentalities of transportation, such as tracks and engines, are treated as 'interstate transportation.'"

It may not be amiss to quote from *Republic Pictures Corp.* v. *Kappler,* 151 F 2d 513, 545 (8th Circ. 1945):

> "The practical test to be applied is whether without the particular service, interstate commerce would be impeded or abated."

Even in the horse and buggy days, the New York Court of Appeals in *Matter of Costello* v. *Taylor,* 217 N.Y. 179 (1916), held that those engaged exclusively in "the attendance upon horses when attached to wagons but not actually moving with them; harnessing and attaching the horses to the wagons; removing them therefrom or placing them and the wagons in the stable, and providing care for and attendance upon the horses while therein" were engaged in the "operation, otherwise than on tracks, on streets, highways, or elsewhere of cars, trucks, wagons or other vehicles ... drawn by horses or mules".

On the basis of all of the foregoing, we submit that "auxiliary vessels which assist vessels" are in precisely the same category as the assisted vessel, and, thus the differentiation made by the District Court is not valid.

Equally invalid, we submit, is the determination herein of the Court of Appeals that "a pilot station vessels [of the kind involved here] does not "operate . . . in United States foreign trade".

Section 607 does not *define the word "vessel"* other than to say it "*includes* cargo handling equipment . . . intended for use primarily on the vessel" and "also includes an ocean going towing vessel or an ocean going barge or comparable towing vessel or barge operated in the Great Lakes" (Section 607(k)(7)), and, by sub-section (f), in regard to "barges and containers", limits its application to "barges and containers which are part of the complement of a qualified vessel."

With that single qualification, the 1970 Act left untouched the then existing provisions, in the Merchant Marine Act, 46 U.S.C. 801, incorporated by reference also in Section 888, the definition of "vessels" as including

> "*all water craft* and other artificial contrivances of whatever description and in whatever state of construction, whether on the stocks [sic] or launched, which are used or capable of being or intended to be used as a means of transportation on water" (emphasis supplied).

Under those definitions, scows and floating barges (*Ellis* v. *United States,* 206 U.S. 246, 259 [1907]), barges on navigable waters without motive power of their own but towable at sea and having sleeping quarters for the men and a galley and messhall (*Kibadeaux* v. *Standard Dredging Co.,* 81 F 2d 670, 5th Circ, 1936 and cases cited therein), a floating derrick (*Sumerlin* v. *Massman Const. Co.,* 199 F 2d 715, 4th Circ, 1952) a coal cleaning barge without power

of its own kept in place by mooring lines and spuds (*Jeffrey* v. *Henderson Bros.*, 193 F 2d 589, 4th Circ, 1951), a house boat without machinery of any kind or sails for propulsion (*The Ark*, 17 F 2d 446, D.C. Fla., 1926), a derrick barge engaged in repairing a lock on the Oswega River (*Maloney* v. *State of New York*, 207 Misc. 894, affd. 2 AD 2d 195, 1956), were held to be vessels; and all persons thereon, whatever their tasks, were held to be seamen.

Congress indicated its full awareness of the broad meaning of "vessel", when it excluded from the benefits of Section 607 "barges and containers" other than those "which are part of the complement of a qualified vessel". Thereby it distinguished between "water craft" that are not self-propelled from those which are and excluded only those that are not self-propelled.

Significant also are the additional facts that the 1970 Act does not define the term "United States foreign trade" other than to include certain "areas in domestic trade" (Section 1177(k)(5)) and does not contain any definition of the word "operated".

II

The legislative history of the 1970 Act does not warrant a departure from the long accepted legal significance of the statutory terms.

(1). If, as was contended by respondent in its brief in the Court of Appeals, Congress had intended that the Act shall *not* apply to "*any* vessel . . . operated in the United States foreign trade" but only to "vessels which carry goods or passengers between the United States and foreign countries" [as contended in that brief], would not Congress have said so? Surely, Congress knew the difference between "any vessel" and a carrying vessel. Surely, Congress was aware of the decisional constructions referred to above. Indeed, when, in the same 1970 Act, Congress

meant an expansion of Section 1244 of 46 U.S.C. to be limited to carrying vessels in certain routes, it used the term "carrying services"*; and, as already pointed out, it excluded "barges and containers" except those "which are part of the complement of a qualified vessel".

If, in the light of Merchant Marine Act, 46 U.S.C. 801 (quoted at page 14, *supra*), Congress intended that the term "vessel" in Section 607 (46 U.S.C. 1177) should have a restrictive meaning beyond excluding "barges and containers" which are not "part of the complement of a qualified vessel"—if Congress intended the term vessel to mean only line-haul carrying vessels—would it not have said so in the definitions in sub-section (k) or elsewhere?

> ". . . acts applying . . . to vessels generally must be construed as comprehending all vessels. If none appear to be excluded by the language of the Act, none can be excluded by construction."
>
> *Gibbons* v. *Ogden*, 22 U.S. 1, 216 (1824).

As in *Browder* v. *United States*, 312 U.S. 335, 338 (1941):

> "The plain meaning of the words of the Act covers this use. No single argument has more weight in statutory interpretation than this."

(2). If, nonetheless, excerpts are to be extracted from the volumes that were said and written in the course of the long Executive and Congressional process which resulted in the enactment of the 1970 Act and such excerpts are to be presented as illuminating Congress's "intent", most significant, it seems to us, are the following.

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* Another illustration is 46 U.S.C. 1301, in regard to the regulation of carriage of goods by sea, Congress, for the purposes of that chapter, defined "the term 'ship' " as meaning "any vessel used for the *carriage* of goods by sea" and limited the application of the chapter to "the period from the time when the goods are loaded on to the time when they are discharged from the ship".

(i) The 1970 Act had its genesis in a Presidental Message on October 22, 1969. It was *entitled* "A Message Transmitting Recommendations For New *Shipbuilding* Program" (emphasis added).

In the early paragraphs of that message, the President said:

> "Both government and industry share responsibility for the recent decline in American shipping *and shipbuilding*. Both government and industry must make a substantial effort to reverse that record. . . . (Emphasis added)

. . .

The first sub-heading in the message was *"The Shipbuilding Industry"*. Under that title the President said:

> "Our [proposed] *shipbuilding* program is designed to meet both of the problems which lie behind the recent decline in this field: low production rates and high production costs . . . only as we plan a major long-range *building* program can we encourage builders to . . . introduce massive production techniques which have kept other American products competitive in world markets . . ." (Emphasis added)

In that message, the President said also:

> "The expansion of American merchant shipbuilding which this program makes possible will provide many new employment opportunities."

(ii) The Report of the *House of Representatives* Committee on Merchant Marine and Fisheries described the administration's bill as one "to amend the Merchant Marine Act, 1936, *to provide for long-range shipbuilding programs*" (Report No. 91-1073, p. 1) "introduced following a message from the President to the Congress on October 23, 1969, *recommending a long-range shipbuilding program*" (*Id.* p. 16)

(iii) The Report of the *Senate* Committe on Commerce, noted (Report No. 91-1080, pp. 9-11; see 2 U.S. Code Congressional and Administrative News, 91st Congress, Second Session 1970, p. 4188):

> ". . . Twice during the last 55 years, in two wars under the most adverse circumstances, the United States has been compelled to undertake massive shipbuilding programs to meet the urgent needs of its commerce and defense. . . ."

In regard to section 607 of the 1970 Act in its final form, as quoted at pages 4-7, *supra*, the *Senate* Committee reported that the section

> "*will do more* than any other provision of this bill to *build ships in United States shipyards* to be operated under the American flag."
>
> 2 U.S. Code, Congressional and Administrative News, 91st Congress, Second Session, 1970, *supra*, page 4213. [Emphasis supplied]

The report observed also that (in contrast to the subsidy provisions) the provisions of section 1177 will cost the government nothing: they "will result in the deferral but not loss of certain tax revenues" (id., p. 4240).

(iv) The objective of stimulating the "shipbuilding industry of the country to move ahead" was stressed by the *Secretary of Transportation* in a letter to the Senate Committee urging the legislation (id., p. 4248).

(v) Perhaps even *more significant* is the following: In the initial bill, the availability of the suggested tax deferment benefit was limited to "qualified *shipping companies*" engaged in foreign trade who demonstrate "managerial ability" and ample "financial resources" (House of Representatives Hearings. Serial No. 91-17, at pp. 21, 79). *Congress changed that* to make the advantage available to "*any citizen*" (as distinguished from a "*shipping company*") in respect to "one or more eligible *vessels* . . . for operation in the United States foreign . . . trade

. . ." without regard to the nature of the owner's business or occupation.

Does not the upholding by the courts below of respondents' contention that the benefits of Section 607 are available only for line haul vessels, in effect, limit the availability of those benefits to shipping companies, precisely as was intended by the drafters of the initial bill, and *thus nullify Congress' refusal to so limit the scope of 607?*

(3). The Court of Appeals, in a footnote in its brief per curiam, noted: "The Senate Report accompanying the bill which was enacted as the Merchant Marine Act of 1970 emphasized that one of the results of the program the Act implemented would be to 'provide an imperative emergency sealift capacity . . .'. S. Rep. No. 91-1190, 1970 U.S. Code Cong. & Ad. News 4195."

Clearly, "*one* of the [anticipated] results"—one to meet an "imperative emergency"—does not exclude other objectives; on the contrary, "one of" clearly implies the existence or expectation of others.

Conclusion

Wherefore, petitioners respectfully pray that a writ of certiorari be granted, the judgments of the courts below be reversed and the case remanded with instructions for the entry of summary judgment in favor of petitioners; and petitioners pray for such other, further or different relief as to the Court seems just and proper.

March 14, 1973.

Respectfully submitted,

COPAL H. MINTZ
MAURICE A. KRISEL
Counsel for Petitioners

KRISEL, BECK & HALBERG
JOHN M. DREWRY
Associated Counsel

APPENDIX

Memorandum Opinion of Rosling, J.

[Title]

Appearances:

Krisel & Beck and John M. Drewry, Esqs., Attorneys for Plaintiffs, Roman Beck, Esq., Of Counsel.

Robert A. Morse, Esq., United States Attorney, Eastern District of New York, Attorney for Defendants, Gilbert S. Fleischer, Esq., Attorney in Charge, New York Office, Admiralty & Shipping Section, Department of Justice, Philip A. Berns, Esq., Of Counsel.

ROSLING, J.:

In these cross-motions for summary judgment under Fed. R. Civ. P. 56, the plaintiffs have submitted pleonastic briefs with extended and repetitious quotations from numerous opinions in reported cases and with excessive underlining of the text which obscures the meaning. Plaintiffs may well have proved a point, but the point they make is an irrelevant one. Their approach to a solution of the problem, in short, is illustrative of the common fallacy denominated *ignoratio elenchi.*

The issue is a narrow one. Plaintiffs are two associations of pilots whose employment by foreign ships for their pilotage through Sandy Hook shoals is compulsory under state law.[1] The associations have three service vessels which ply the waters in the area between the local shoreline and the foreign vessels so that pilots whom they transport may be available to these ships which require their service.

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[1] New York State Navigation Law § 88.

Memorandum Opinion of Rosling, J.

In 1970 the Merchant Marine Act was amended in part to grant tax relief through authorizing the establishment by those intended of a "Capital Construction Fund."[2]

Those eligible or qualified for such relief are defined in 46 U.S.C. § 1177(k) as follows:

"Definitions

(k) For purposes of this section—

(1) The term 'eligible vessel' means any vessel—

(A) constructed in the United States and if reconstructed, reconstructed in the United States,

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[2] 46 U.S.C. § 1177(a), the provision referred to, reads as follows:

"(a) Any citizen of the United States owning or leasing one or more eligible vessels (as defined in subsection [k] [1] of this section) may enter into an agreement with the Secretary of Commerce under, and as provided in, this section to establish a capital construction fund (hereinafter in this section referred to as the 'fund') with respect to any or all of such vessels. Any agreement entered into under this section shall be for the purpose of providing replacement vessels, additional vessels, or reconstructed vessels, built in the United States and documented under the laws of the United States for operation in the United States foreign, Great Lakes, or noncontiguous domestic trade or in the fisheries of the United States and shall provide for the deposit in the fund of the amounts agreed upon as necessary or appropriate to provide for qualified withdrawals under subsection (f) of this section. The deposits in the fund, and all withdrawals from the fund, whether qualified or nonqualified, shall be subject to such conditions and requirements as the Secretary of Commerce may by regulations prescribe or are set forth in such agreement; except that the Secretary of Commerce may not require any person to deposit in the fund for any taxable year more than 50 percent of that portion of such person's taxable income for such year (computed in the manner provided in subsection [b] [1] [A] of this section) which is attributable to the operation of the agreement vessels."

(B) documented under the laws of the United States, and

(C) operated in the foreign or domestic commerce of the United States or in the fisheries of the United States.

* * * * * *

(2) The term 'qualified vessel' means any vessel—

(A) constructed in the United States and, if reconstructed, reconstructed in the United States,

(B) documented under the laws of the United States, and

(C) which the person maintaining the fund agrees with the Secretary of Commerce will be operated in the United States foreign Great Lakes, or noncontiguous domestic trade or in the fisheries of the United States.

(3) The term 'agreement vessel' means any eligible vessel or qualified vessel which is subject to an agreement entered into under this section.

(4) The term 'United States', when used in a geographical sense, means the continental United States including Alaska, Hawaii, and Puerto Rico.

(5) The term 'United States foreign trade' includes (but is not limited to) those areas in domestic trade in which a vessel built with construction-differential subsidy is permitted to operate under the first sentence of section 1156 of this title.

(6) The term 'joint regulations' means regulations prescribed under subsection (1) of this section.

(7) The term 'vessel' includes cargo handling equipment which the Secretary of Commerce determines is

intended for use primarily on the vessel. The term 'vessel' also includes an ocean-going towing vessel or an ocean-going barge or comparable towing vessel or barge operated on the Great Lakes.

(8) The term 'noncontiguous trade' means (i) trade between the contiguous forty-eight States on the one hand and Alaska, Hawaii, Puerto Rico and the insular territories and possessions of the United States on the other hand, and (ii) trade between Alaska, Hawaii, and Puerto Rico and such territories and possessions and (iii) trade between the islands of Hawaii."

Plaintiffs, already possessed of three pilot boats, made application to the Secretary of Commerce for entry into an agreement pursuant to 46 U.S.C. § 1177(a) to establish a Capital Construction Fund to construct a fourth such vessel to be operated in servicing the United States foreign trade. The Secretary denied the application on the ground that the type of vessel proposed to be built was not covered by the Act. It was in effect to compel the Secretary to recognize the pilot boat as eligible and qualified for the making of the agreement whereby the fund might be established and the consequent tax benefit obtained that suit is here brought.

Reduced to its simplest denominator, it is plaintiffs' contention that the pilot boat will operate in foreign trade within the intent of the statute, and in support of such position the associations cite many cases to sustain the unquestionable thesis that a pilot boat provides services to boats that do operate in foreign trade. Nothing is shown, however, that the pilot vessel itself is engaged in foreign trade in the sense in which the Act was enacted. Plaintiffs would have us construe the words "vessels operating in the foreign trade" as though

they read "auxiliary vessels which assist vessels operating in the foreign trade." We see no reason for so doing and are not persuaded by the turgid briefs plaintiffs have submitted.

The Secretary rejected the plaintiffs' application on the ground that the vessel the associations proposed as a replacement vessel would not be a "qualified vessel". Nothing being shown to warrant overriding such holding plaintiffs' motion for summary judgment is denied and defendants' cross-motion is granted.

Settle order on notice.

GEORGE ROSLING
U. S. D. J.

(Filed May 11, 1972.)

Order and Judgment by the District Court.

[Title]

Plaintiffs having made a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure and General Rule 9 of this Court, requesting summary judgment declaring that the action of the Maritime Administration of the Department of Commerce was erroneous, arbitrary and capricious; that plaintiffs' proposed pilot vessel was a "qualified" vessel within the Merchant Marine Act of 1970, and that defendants allow plaintiffs' application to establish a Capital Construction Fund under the provisions of the aforementioned Act; the United States of America, *et al.*, having filed a cross-motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, asking that the Court dismiss plaintiffs' action with prejudice, and for such other and further relief as to the Court may seem just in the premises, and said motion having come on for a hearing before this Court on the 10th day of March 1972, and Robert A. Morse, United States Attorney, and Gilbert S. Fleischer, Attorney in Charge, Admiralty and Shipping Section, Department of Justice, having appeared by Philip A. Berns, Esq., in opposition to plaintiffs' motion and in support of said cross-motion for the United States of America, *et al.*, and Roman Beck of Krisel and Beck and John M. Drewry, attorneys for plaintiffs, having appeared in support of plaintiffs' motion and in opposition to the cross-motion of the United States of America, *et al.*, and said motion having been orally argued, and the Court after having read the memoranda and affidavits submitted by the parties, and after due deliberation having filed a memorandum opinion on May 10, 1972, denying the motion of plaintiffs and granting the cross-motion of the United States of America, *et al.*, and having directed that an order be submitted on notice, it is

Order and Judgment Appealed From.

Now, on the motion of Robert A. Morse, and Gilbert S. Fleischer, attorneys for United States of America, *et al.*,

ORDERED that the motion of plaintiffs, United New York Sandy Hook Pilots Association and United New Jersey Sandy Hook Pilots Association for a judgment declaring that the action of the Maritime Administration of the Department of Commerce is erroneous, arbitrary and capricious, and further declaring that plaintiffs' proposed pilot station vessel is, and will be, a "qualified" vessel within the meaning of the Merchant Marine Act of 1970, and that defendants grant plaintiffs' application to establish a Capital Construction Fund be, and hereby is, denied in all respects, and it is

FURTHER ORDERED that the cross-motion of defendants, United States of America, *et al.*, for summary judgment dismissing this action with prejudice be, and the same hereby is, granted in all respects, and it is

FURTHER ORDERED that the action of United New York Sandy Hook Pilots Association and United New Jersey Sandy Hook Pilots Association against United States of America, Maurice H. Stans, Secretary of Commerce, *et al.* (71 Civ. 357) be, and the same here is, dismissed with prejudice and without costs.

Dated: Brooklyn, New York, May 31, 1972

s/ GEORGE ROSLING
U. S. D. J.

Opinion and Judgment.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 238—September Term, 1972.

(Argued December 18, 1972 Decided December 19, 1972.)

Docket No. 72-1783

UNITED NEW YORK SANDY HOOK PILOTS ASSOCIATION and UNITED NEW JERSEY SANDY HOOK PILOTS ASSOCIATION,

Plaintiffs-Appellants,

v.

MAURICE H. STANS, Secretary of Commerce, JOHN B. CONNALLY, Secretary of the Treasury, ANDREW GIBSON, as Assistant Secretary of Commerce and as Maritime Administrator Maritime Administration, Department of Commerce, M. E. PARR, Chief, Office of Subsidy Administration, Maritime Administration, Department of Commerce,

Defendants-Appellees.

Before:

MOORE, MULLIGAN and TIMBERS,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York, George Rosling, *Judge,* dismissing appellants' complaint which sought to overturn a decision of the Maritime Administration of

the Department of Commerce denying appellants benefits under the Merchant Marine Act of 1970.

Affirmed.

COPAL MINTZ, New York, N. Y. (Maurice A. Krisel, Roman Beck, Krisel & Beck, New York, N. Y. and John M. Drewry, New York, N. Y., of counsel), *for Plaintiffs-Appellants.*

MORTON HOLLANDER, Attorney, United States Department of Justice, Washington, D. C. (Harlington Wood, Jr., Assistant Attorney General, Gilbert S. Fleischer, Thomas G. Wilson, Attorneys, United States Department of Justice, Washington, D. C., Robert Morse, United States Attorney for the Eastern District of New York, Brooklyn, N. Y., of counsel), *for Defendants-Appellees.*

PER CURIAM:

Appellants appeal from a judgment dismissing their complaint with prejudice upon motion and a cross-motion for summary judgment and upholding the action of the Maritime Administration of the Department of Commerce in finding appellants' proposed pilot station vessel not qualified for certain benefits under the Merchant Marine Act of 1970.

The proposed vessel, which is to serve as a pilot station ship to house those who pilot ships entering and leaving New York Harbor, does not come within the purposes of the Congressional enactment which bestowed tax benefits on vessels built "for operation in the United States foreign * * * trade". 46 U.S.C. § 1177(a). A pilot station vessel

neither operates in United States foreign trade nor adds to the "sealift capacity" of our merchant marine.* The trial court correctly found that a pilot vessel does not come within the terms of section 1177(a) and hence is not entitled to the tax benefits which accompany the creation of a capital construction fund under that section.

Judgment affirmed.

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* The Senate Report accompanying the bill which was enacted as the Merchant Marine Act of 1970 emphasized that one of the results of the program the Act implemented would be to "provide an imperative emergency sealift capacity * * *". S.Rep. 91-1190, 1970 *U. S. Code Cong. & Ad. News* 4195.